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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re:
USA COMMERCIAL MORTGAGE COMPANY,

Debtor.

In re:
USA CAPITAL REALTY ADVISORS, LLC,

Debtor.

In re:
USA CAPITAL DIVERSIFIED TRUST DEED
FUND, LLC,

Debtor.

In re:
USA CAPITAL FIRST TRUST DEED FUND, LLC,

Debtor.

In re:
USA SECURITIES, LLC,

Debtor.

Affects:
☐ All Debtors
☒ USA Commercial Mortgage Company
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund, LLC
☐ USA Capital First Trust Deed Fund, LLC
☐ USA Securities, LLC

Case Nos.:
BK-S-06-10725-LBR
BK-S-06-10726-LBR
BK-S-06-10727-LBR
BK-S-06-10728-LBR
BK-S-06-10729-LBR

JOINTLY ADMINISTERED
Chapter 11 Cases

Judge Linda B. Riegle

**APPLICATION TO
COMPROMISE AND SETTLE
CONTROVERSIES WITH
ANTHONY MONACO, SUSAN K.
MONACO, AND MONACO
DIVERSIFIED CORPORATION.**

Hearing Date: June 15, 2010

Hearing Time: 9:30 a.m.

**APPLICATION UNDER 11 U.S.C. § 9019
TO COMPROMISE AND SETTLE CONTROVERSIES AGAINST ANTHONY
MONACO, SUSAN K. MONACO, AND MONACO DIVERSIFIED CORPORATION IN
ADV. NO. 08-01125**

The USACM Liquidating Trust (the "USACM Trust"), hereby files this *Application to Compromise and Settle Controversies with Anthony Monaco, Susan K. Monaco and Monaco*

1 *Diversified Corporation* (the “Motion”) and moves this Honorable Court for an order pursuant to
 2 Federal Rule of Bankruptcy Procedure 9019 (“Rule 9019”) approving the *Settlement Agreement*,
 3 *Mutual Release, and Covenants* (the “Settlement Agreement,” attached hereto as Exhibit “A”)
 4 between the USACM Trust, on the one hand, and Anthony Monaco, Susan K. Monaco and
 5 Monaco Diversified Corporation on the other (the “Monaco Defendants”) (collectively the
 6 Monaco Defendants and the USACM Trust shall be referred to as the “Parties”).

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 8 This Motion is made pursuant to Federal Rule of Bankruptcy Procedure 9019 and is
 9 based upon the points and authorities listed herein, the Declaration of Geoffrey L. Berman in
 10 Support of the Motion for Approval of Settlement Pursuant to Rule 9019 the Federal Rules of
 11 Bankruptcy Procedure (the “Berman Declaration,” hereto attached as Exhibit “B”), and the
 12 Affidavits of each of the Monaco Defendants (the “Monaco Affidavits,” hereto attached as
 13 Exhibit “C”), and any evidence and argument to be presented at the time of the hearing of this
 14 Motion.

15 16 **BACKGROUND FACTS**

17 *The USACM Trust*

18 On April 13, 2006 (the “Petition Date”), USA Commercial Mortgage Company
 19 (“USACM”) and certain of its affiliated companies and subsidiaries (collectively, the “Debtors”),
 20 each filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the
 21 “Bankruptcy Code”) in the United States Bankruptcy Court for the District of Nevada (the
 22 “Bankruptcy Court”). The Debtors’ chapter 11 cases are being jointly administered under
 23 Bankruptcy Case No. BK-S-06-10725-LBR (the “USA Capital Bankruptcy Case”). On January
 24 8, 2007, the Bankruptcy Court confirmed the Third Amended Joint Chapter 11 Plan of
 25 Reorganization (the “Joint Plan”), and on March 12, 2007, the Joint Plan became effective and
 26 the Debtors emerged from bankruptcy.
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 28

The USACM Trust was created pursuant to the Joint Plan and is governed by the provisions of the Liquidating Trust Agreement (the “USACM Trust Agreement”). The Joint Plan expressly retained the Debtors’ causes of action for enforcement by the USACM Trust, pursuant to 11 U.S.C. § 1123(b)(3)(B). Accordingly, the USACM Trust now holds any and all potential claims and causes of action, whether arising pre-petition or post-petition, that USACM and the USACM Trust may have or may at any time have had against the Monaco Defendants.

The Pending Litigation

On April 11, 2008, the USACM Trust commenced adversary proceeding number 08-01125, entitled *USACM Liquidating Trust v. Eagle Ranch, et al.* (the “Adversary Proceeding”) seeking restitution from the Monaco Defendants related to the unjust enrichment they received in connection with approximately \$7.4 million transferred by USACM to real estate development projects in which the Monaco Defendants held direct or indirect equity interests. Ex. B, ¶ 4. The Monaco Defendants denied each and every one of the USACM Trust’s allegations in the Adversary Proceeding.

The Proposed Settlement

Following a series of discussions between the USACM Trust and the Monaco Defendants, through their respective counsel, the Parties reached an agreement to resolve the Adversary Proceeding as against the Monaco Defendants subject to the execution of a settlement agreement that is approved by the Bankruptcy Court. Ex. B, ¶ 5. The material terms of the Proposed Settlement are summarized as follows:¹

1. Anthony Monaco, Susan Monaco and MDC, jointly and severally, unconditionally agree to a judgment against all the Defendants in the amount of Five Million Five Hundred

¹The following is solely a summary of the terms of the Settlement Agreement, and in no way is intended as an amendment, modification, or supplementation of the Settlement Agreement terms. The terms of the written settlement agreement between the Parties shall prevail in the event of any conflict with this summary. Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Settlement Agreement.

Thousand Dollars (\$5,500,000) in accordance with the terms and conditions contained herein.

2. The Defendants shall deliver to the USACM Trust a fully executed Agreed Judgment in the amount of Five Million Five Hundred Thousand Dollars (\$5,500,000) substantially in the form as that attached hereto as Exhibit "A" (the "**Agreed Judgment**"). Defendants expressly authorize the USACM Trust to file the Agreed Judgment with the Bankruptcy Court or any other court of competent jurisdiction to consider such matters, and upon the Bankruptcy Court's approval of the terms of this Settlement Agreement, Defendants agree to take any and all necessary steps to enter the judgment in the United States District Court, District of Nevada in the matter Case No. 2:09-CV-01947-RCJ-PAL currently before Judge Jones (the "District Court").
3. Upon execution of this Settlement Agreement and the Agreed Judgment (but before the entry of the Agreed Judgment), the Plaintiff shall file the motion to approve the settlement. This Motion satisfies this term of the settlement.
4. The Parties will enter the judgment upon the Bankruptcy Court's granting, orally and/or in a written order, whichever comes first, the Rule 9019 Motion approving this Agreement.
5. Subject to and upon entry of the Agreed Judgment as set forth in this Agreement, and in no event before the entry of the Agreed Judgment, the Plaintiff fully releases and discharges the Monaco Released Parties from any and all liability with respect to the USACM Trust Released Claims.
6. Upon entry of the Agreed Judgment as set forth in this Agreement, the Defendants, on behalf of themselves and the Monaco Released Parties, fully release and discharge the USACM Trust Released Parties from any and all liability with respect to the Monaco Released Claims.
7. The Parties agree to take whatever action necessary to suspend trial proceedings pending the approval of this Settlement pursuant to Rule 9019.
8. The Parties each agree to take such actions and execute such documents (and, where applicable, so instruct their counsel) as may be reasonably necessary to implement the terms of this Agreement, including, without limitation, obtaining approval of this Agreement by the Bankruptcy Court under Federal Rule of Bankruptcy Procedure 9019.

ARGUMENT

Bankruptcy Rule 9019 provides that, "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." FED. R. BANKR. P. 9019. In order to approve a compromise and settlement, the Court must find that it is fair and equitable to the

1 estate and, “[i]n determining the fairness, reasonableness and adequacy of a proposed
 2 settlement, the court must consider: (a) the probability of success in the litigation; (b) the
 3 difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the
 4 litigation involved, and the expense, inconvenience and delay necessarily attending it; and (d)
 5 the paramount interest of the creditors and a proper deference to their reasonable views in the
 6 premises.” *Arden v. Motel Partners (In re: Arden)*, 156 F.3d 729 (9th Cir. 1999); *Martin v.*
 7 *Kane (In re A&C Properties)*, 784 F.2d 1377 (9th Cir. 1986), *cert. denied*, 479 U.S. 854 (1986).

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 9 The USACM Trust is not required to satisfy each of these factors so long as the factors
 10 as a whole favor approving the settlement. *See In re Pacific Gas & Electric Co.*, 304 B.R. 395,
 11 416 (Bankr. N.D.Cal. 2004). In considering the factors, “a precise determination of the likely
 12 outcome is not required, since an exact judicial determination of the values at issue would
 13 defeat the purpose of compromising the claim.” *In re Telesphere Comm’s, Inc.*, 179 B.R. 544,
 14 553 (Bankr. N.D.Ill. 1994) (internal quotations omitted). Thus, rather than determining various
 15 issues of fact and law, the court should “canvass the issues and see whether the settlement
 16 fall[s] below the lowest point in the range of reasonableness.” *In re Lion Capital Group*, 49
 17 B.R. 163, 175 (Bankr. S.D.N.Y. 1985) (internal quotations omitted).
 18

19 The USACM Trust respectfully submits that the Proposed Settlement satisfies each of
 20 these factors. If the proposed settlement it is not approved by this Court, the USACM Trust will
 21 be required to incur significant additional expenses to pursue the Adversary Proceeding against
 22 the Monaco Defendants. The settlement was reached on the eve of the trial between the parties
 23 to this settlement. As such, if this settlement is not approved the Trust would have to seek a new
 24 trial date and immediately prepare for trial at significant cost to the Trust. Even if the USACM
 25 Trust were ultimately successful at trial, there is substantial uncertainty concerning the ability to
 26 recover any resulting judgment from the Monaco Defendants. Ex. B, ¶ 6.
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Moreover, even if the USACM Trust were ultimately successful at trial against the Monaco Defendants, there is substantial likelihood that the USACM Trust would have to endure both the cost and delay of an appeal by the Monaco Defendants. Mr. Monaco's assets are insufficient to satisfy a judgment on the damages that the USACM Trust was seeking at trial that could have been levied against him as a result of a USACM's claim against him in the above-captioned lawsuit, and he has no liquid assets to contribute to this settlement. Ex. C.

During settlement discussions, the Monaco Defendants made disclosures, and provided supporting documentation to the USACM Trust regarding their financial condition. The Monaco Defendants have advised that they are not in a financial position to make any settlement involving a cash component, and based on discussions with the Monaco Defendants, the USACM Trust believes that is the case. Ex. B. ¶ 7.

The terms of the proposed settlement fall within the reasonable range of likely outcomes of the Adversary Proceeding against the Monaco Defendants and will eliminate litigation risks, costs, and delay associated with trial and a potential appeal. Ex. B, ¶ 8. The proposed settlement is the product of arms length bargaining, without fraud or collusion. Ex. B, ¶ 9. The proposed settlement will thus facilitate recoveries for the benefit of the beneficiaries of the USACM Trust who have suffered a loss as a result of the events leading to the USA Bankruptcies without the further expenditure of significant funds of the Trust. Ex. B, ¶ 9.

Accordingly, the USACM Trust has concluded in the exercise of its reasonable business judgment that the benefits gained by resolving the Adversary Proceeding on the terms set forth in the proposed settlement exceed any benefit that the USACM Trust would likely receive in fully litigating this matter. Ex. B, ¶ 10.

CONCLUSION

For the foregoing reasons, the USACM Trust respectfully requests that this Court

1 approve the proposed settlement on the terms set forth above and provide such other and further
2 relief as the Court deems appropriate.

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4 Respectfully submitted May ___, 2010.

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6 **DIAMOND MCCARTHY LLP**

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Counsel for USACM Liquidating Trust

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16 **CERTIFICATE OF SERVICE**

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18 I hereby certify that on the ___th day of May 2010, I caused to be served a true and correct
19 copy of the foregoing **APPLICATION TO COMPROMISE AND SETTLE**
20 **CONTROVERSIES** by electronic transmission to the Post-Confirmation Service List, dated
21 March 31, 2009, and to counsel for the Monaco Defendants as follows: Harold P. Gewerter,
22 Harold P. Gewerter Esq. Ltd., 2705 Airport Drive, North Las Vegas, Nevada, 89032,
23 Harold@gewerterlaw.com, counsel of record for the Monaco Defendants.
24

25
26 /s/ Catherine Burrow
27 Catherine Burrow, Legal Assistant
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